In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 620

MILTON LUROS, et al., PETITIONERS

v.

WILLIAM C. HANSON, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals dismissing the petition for a writ of mandamus (R. 143; Pet. App. A) is not reported. The opinion and order of the district court denying the motion to dismiss is set out in the Record at pp. 40-57 and in Petitioner's Appendix "B" pp. 2-12.[1]

[1] This opinion is incorporated in the broader ruling of the district court denying various pre-trial motions of petitioner. See *United States* v. *Luros*, 243 F. Supp. 160.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 1965 (R. 143; Pet. App. A). The petition for a writ of certiorari was filed on September 27, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether mandamus will lie to compel a district court to decide in advance of trial whether material on which an indictment was based is obscene.

STATEMENT

On March 24, 1965, a twenty-five count indictment was returned against petitioners in the United States District Court for the Northern District of Iowa charging a conspiracy to violate the federal obscenity laws and substantive violations thereof (18 U.S.C. 371, 1461, 1462) (R. 10-39). In their pre-trial motion to dismiss, petitioners requested the district court to decide whether the books and magazines enumerated in the indictment were, as a matter of law, not obscene (R. 40-48). The court refused to decide the issue at that preliminary stage, pointing out that such a "delicate constitutional judgment" cannot be made "at a high level of abstraction" (Pet. App. B 5) but only after all the relevant evidence necessary for resolution of the question has been adduced at trial. The court further stressed that for it to make such a threshold ruling would mean that an appellate court would have to review the case "on a record devoid of

evidence" (Pet. App. B 5) and that, in essence, to grant petitioners' request would turn a motion to dismiss an indictment into "a device for a summary trial of the evidence" (Pet. App. B 3).

The court of appeals dismissed a petition for a writ of mandamus to compel the district court to decide the issue (Pet. App. A). The case is presently set for trial on October 18, 1965 (R. 58).[2]

ARGUMENT

In essence, petitioners' argument is that a defendant is entitled as of right to a pre-trial resolution of the question whether there is sufficient evidence to warrant submission of the issue of obscenity to the jury. That is the necessary premise of their claim that mandamus is available to compel the district court to make such an advance ruling. In our view, the premise is unsound.

1. In refusing to make an advance decision, the court followed the usual rule that, on a motion to dismiss, the sufficiency of an indictment must be determined not from external evidence, but from the face of the indictment itself; and that all well-pleaded facts contained therein are taken to be true. See generally, *United States* v. *Sampson*, 371 U.S. 75, 79; *United States* v. *South Florida Asphalt Co.*, 329 F.2d 860, 865 (C.A. 5), certiorari denied *sub. nom. R. H. Wright, Inc.* v. *United States*, 379 U.S. 880; *Padilla* v. *United States*, 278 F.2d 188, 190 (C.A. 5). Cf. *Rus-*

[2] On October 8, 1965, Mr. Justice White denied an application for a stay of the district court proceedings.

sell v. *United States*, 369 U.S. 749, 770-771. A party to a lawsuit is not entitled to an advisory opinion founded on evidence not yet introduced and on issues not yet refined and sharpened by trial. See *United States* v. *Fruehauf*, 365 U.S. 146, 157-159. We may assume that a court has *power* to make the initial determination here sought on the basis of the books and magazines charged in the indictment and informally submitted to the district court. See *United States* v. *Halseth*, 342 U.S. 277, 278-279; but cf. *United States* v. *Fruehauf*, 365 U.S. 146, 158. But this does not render a refusal to make such a preliminary determination an abuse of discretion. The trial court concluded that an immediate ruling would improperly anticipate "that the evidence would not prove the offense charged" and would, on appeal, require an appellate court to base its "decision on a record devoid of evidence" (Pet. App. B 5). The problems of applying to particular facts the standards laid down by this Court with respect to charges of obscenity are not simple. See *Roth* v. *United States*, 354 U.S. 476; *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478 (opinion of Harlan, J.); *Jacobellis* v. *Ohio*, 378 U.S. 184 (opinion of Brennan, J.). A trial judge can hardly be criticized—much less characterized as arbitrary—if he chooses to pretermit resolution of these difficult issues until after the government has made out its case in the formal and solemn atmosphere of an adversary trial.

Rule 12(b)(4), F.R. Crim. P., specifically grants such discretion, providing in pertinent part that:

> A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. * * *

The language of this Court in *United States* v. *Fruehauf*, 365 U.S. 146, 157, is equally applicable here:

> Such opinions, such advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests, we have consistently refused to give. * * *

2. Petitioners misread the decisions of this Court when they argue (Pet. 8-9) that district courts have a "constitutional obligation" to decide the question of obscenity when raised in a pre-trial motion to dismiss an indictment. No decision of this Court has undercut the underlying rationale of *Roth* v. *United States*, *supra*, that, as a normal matter, it is for the jury, in the first instance, to decide the issue. The plurality opinion in *Jacobellis* v. *Ohio*, 378 U.S. 184, does not establish the contrary. Rather, in spelling out the role of this Court in obscenity cases the opinion rejects only the doctrine that a jury finding of obscenity "is all but conclusive," "with this Court exercising only a limited review such as that needed to determine whether the ruling below is supported by 'sufficient evidence.'" 378 U.S. 187. This does not

mean that a constitutional decision *must* be made *before* trial irrespective of the view of the district court that the matter is not yet ripe for decision.[5]

Equally without persuasive force is petitioner's assertion that an immediate ruling is necessary because the "very institution of criminal or civil proceedings have chilling effect on protected expression" (Pet. 9-10). The constitutionality of obscenity legislation has been recently upheld (*Roth* v. *United States*, 354 U.S. 476), and the only issue here is whether the material challenged is obscene within the intendment of that legislation. A prompt trial in which the issues are fully explored is surely the normal and effective means of making that kind of determination.

3. For the reasons set forth above, this case does not meet the stringent requirements which would warrant resort to the extraordinary writ of mandamus, a remedy "reserved for really extraordinary cases," *Ex parte Fahey*, 332 U.S. 258, 259-260, and used only to "confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is the duty to do so," *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26. See, also, *Schlagenhauf* v. *Holder*, 379 U.S. 104, 109-110; *Platt* v. *Minnesota Mining Company*, 376 U.S. 240, 245.

The mere claim of constitutional overtones does not require resort to the writ. See *Cobbledick* v. *United States*, 309 U.S. 323, 325-326. Nor is petitioners'

[5] The fact that some courts have chosen to make a preliminary determination is therefore no authority for the proposition that a court must make such a determination.

position advanced by the claim that they would suffer hardship by a trial in the Northern District of Iowa (where venue was properly laid because the books were sent there).[4] As this Court also pointed out in *Cobbledick* v. *United States*, *supra*, 309 U.S. at 325: "Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." Moreover, the Court has frequently admonished that "the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law." *Di Bella* v. *United States*, 369 U.S. 121, 126; *Parr* v. *United States*, 351 U.S. 513, 519-520. There is no compelling reason to permit an intermediate appeal in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of ceritorari be denied.

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[4] The question of transfer which was raised by pre-trial motion was decided against petitioners after exhaustive analysis by the district court (see 243 F. Supp. 160, 173-178).

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